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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DANIEL ARTURO CARDENAS, Defendant and Appellant.	F062414 (Tulare Super. Ct. Nos. VCF235777A & VCF200756A) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. James W. Hollman, Judge.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Galen N. Farris, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In a consolidated appeal, appellant Daniel Arturo Cardenas appeals from a judgment of conviction of one count of street terrorism and 10 counts of gang-related attempted murder with multiple firearm enhancements. Appellant also appeals from the revocation of probation in an unrelated case.

STATEMENT OF THE CASE

Case No. VCF200756A

On April 11, 2008, appellant pleaded no contest to burglary (Pen. Code,[1] § 459) and misdemeanor vandalism (§ 594, subd. (a)). On May 6, 2008, he was placed on formal probation for three years subject to service of one year in the county jail. On April 22, 2011, the superior court revoked appellant's probation after he was charged in Case No. VCF235777A, and the court sentenced him to a concurrent term of two years in state prison.

On May 2, 2011, appellant filed a timely notice of appeal.

Case No. VCF235777A

On February 24, 2011, a jury returned verdicts finding appellant guilty of one count of street terrorism (§ 186.22, subd. (a)) and 10 counts of willful and premeditated attempted murder (§§ 664/187, subd. (a), 189) committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)(C)) with a principal's personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subds. (d) and (e)), and a principal's personal and intentional discharge of a firearm (§ 12022.53, subds. (c) and (e)).

On April 22, 2011, the court sentenced appellant to consecutive terms of 25 years to life in state prison on two counts of attempted murder. The court imposed concurrent terms of 25 years to life on the remaining counts of attempted murder. The court imposed and stayed a two-year term on the street terrorism count (§ 654). The court

[1] All further statutory references are to the Penal Code unless otherwise stated.

revoked appellant's probation in case No. VCF200756 and imposed a concurrent term of two years. The court also imposed a concurrent term of three years in unrelated case No. VCF238978A.

On May 4, 2011, appellant filed a timely notice of appeal. We affirm.

STATEMENT OF FACTS

On the afternoon of January 16, 2010, a group of Visalia residents gathered in Mill Creek Park to play football. The players included Jaime Gonzalez, Omar Gonzalez, Istevan Gonzalez, Rogelio Gonzalez, Juan Vallejo, Andy Vallejo, Sr., Andy Vallejo, Jr., David Ortiz, and Raul Hernandez. A shooting took place during the football game, and Samuel Banuelos, a spectator who was taking pictures of the game, photographed the shooter as he fled the scene.[2]

Before the shooting occurred, Ortiz, Andy Sr., and Andy Jr., saw three young men and a woman eating food in a different area of the park. The quartet finished their meal and drove away in a white car. The driver of the car engaged in "mad-dogging," i.e., showing disrespect to the players on the playing field. Andy, Sr., and Andy, Jr., noticed the men in the white car were wearing blue clothing, and David Ortiz described the trio of males with shaved heads as "blue siders." Some of the football players were dressed in red clothing. Joseph Madrigal, another visitor to Mill Creek Park that day, was affiliated with the Norteno criminal street gang.

Approximately 20 minutes after the white car left the park, the car returned and pulled to the side of the road. One of the male occupants got out of the back seat, walked toward the football players, and threw up a hand signal. Jaime Gonzalez interpreted the hand signal as gang-related. After the man completed the hand gesture, he pulled a gun from behind his back and started firing shots at the players. Juan Vallejo heard the

[2] We will use given names in the remainder of our opinion except where the use of a surname is necessary for clarity of identification and expression.

shooter yell the words "Sur Trece" and "South Side Kings" just before he discharged his weapon. Omar Gonzalez said the shooter had a shaved head and was wearing a sweater.

Omar said the other players began running away from the shooter, and that he was the last to do so. The shooter "started letting off shots" just as Omar began running behind the other players. Omar testified a bullet struck his lower back, and he spent five days in the hospital. Rogelio Gonzalez testified that several bullets missed him by about five feet. Andy, Sr., testified the shooter pointed the gun directly at him, and he sensed a bullet pass by his head. Raul Hernandez said one shot hit the ground near his leg. Banuelos said the shots occurred rapidly in the span of a minute.

Visalia Police Detective Robert Gonzales went to Mill Creek Park after the shooting and then went to Kaweah Delta Hospital to interview the injured players in the emergency room. Detective Gonzales said he spoke with Istevan Gonzalez about the shooting. According to Detective Gonzales, Istevan "stated that he had observed the shooter and described him as a Hispanic male, skinny, with a shaved head, kind of a sucked-in appearance on his face, walking from the east side of the park towards him and the group that was in the middle of the park playing football." Istevan told Detective Gonzales that the shooter ran towards him and the other football players, and shot his handgun at them. Raul Hernandez told Detective Gonzales that the shooter threw up a hand sign for the "South Side Kings" (SSK), a clique of a southern-affiliated gang.

Officer Dwight Brumley testified that he was an investigator with the Visalia Police Department Gang Suppression Unit. Officer Brumley testified at length about the Sureno and Norteno criminal street gangs and said that, in his experience as a peace officer, he had contacts with more than 500 members of each of the two gangs. Brumley explained that members of the two gangs use particular hand signs, explaining: "Well, like our local gangs, like the South Side Kings, will use a K. They'll put up two fingers to represent a K. They'll also use number 3, whereas Nortenos will use number 4, representing number 13 and the number 14 of the alphabet." Brumley further explained

that gangs have subgroups called cliques, and that Tulare County cliques include "Loco Park," "SSK," "Wicked Ass Surenos," and several other variations. Brumley said the SSK are cliques under the Sureno umbrella. Based on Brumley's experience, Sureno gang members have been involved with murder, attempted murder, assault with a deadly weapon, and narcotics sales. Brumley explained at length the multiple methods for validating a member of a criminal street gang.

Officer Brumley testified about the events of January 16, 2010, at Mill Creek Park. Although Brumley was off duty, Detective Leroy Hickey and other officers at the scene briefed Brumley about the events that transpired. Brumley said he also spoke with the victims of the shooting and learned "the shooter had flashed several gang signs consisting of S's and K's." Brumley said the "S" signifies "Sureno" and the "K's" signify "Kings." Brumley said that after a photograph of the suspect car was enlarged, "it became more obvious who the individuals were in the car." Brumley suspected the car belonged to appellant because he had spoken to appellant about 10 days earlier and appellant was driving a white Chevy Lumina. At their January 6, 2010, meeting, appellant told Brumley he was a SSK gang member who had the moniker "Chicano."

Brumley met with appellant again on January 20, 2010. Appellant confirmed the car in the photograph was his vehicle. Brumley said a detective obtained a surveillance video from the Little Caesar's Pizza at Mary's Vineyard Center and made still photographs of people who visited the restaurant on January 16. Brumley recognized Kevin "Snoopy" Paredez in one of the still photographs. Brumley said he and appellant discussed the events of Saturday, January 16. Appellant told Brumley that he was moving and that Gilberto "Solo" Reveles and Paredez came over to his place for 15-to-20 minutes, talked to appellant, and then left. Appellant eventually disclosed to Brumley that he, Reveles, and Paredez went to the Little Caesar's Pizza at Mary's Vineyard Center, got food, and ate it at the park on Lover's Lane. When Brumley asked whether a shooting had occurred, appellant "put his head down and nodded yes." Brumley said he

contacted Reveles and Paredez on January 21, 2010. In Brumley's opinion, appellant was an active Sureno gang member because "he associates with gang members, he's involved in gang-related crimes, he wears gang-related clothing, he admits his gang membership, and he admits his gang membership in a custodial facility." Brumley also testified at length that Reveles and Paredez were Sureno/SSK gang members.

In response to a hypothetical question patterned after the sequence of events of January 16, 2010, Brumley testified the shooting benefited the Sureno gang, was carried out in association with the Sureno street gang, and elevated the shooter's standing within the SSK clique of the Sureno street gang. Brumley also said the shooting benefited the person who served as the "wheel man," and the person who served as the "lookout." Brumley opined the shooting furthered the Sureno gang and the SSK clique because it demonstrated, among other things, "their strength, their ability to answer disrespects, that they're a[n] organization or a criminal street gang to be [reckoned] with or to be identified as far as being violent, you know, and if you mess with a South Side King gang member, this is what could happen."

Visalia Police Officer Detective Hickey interviewed appellant on January 20, 2010. Appellant told Detective Hickey that he owned a 1998 Chevrolet Lumina and that he was in the process of moving his residence on January 16, 2010, when Reveles, Paredez, and Reveles's girlfriend, Marlene, stopped by. Appellant said he, Reveles, and Paredez were all members of the South Side Kings gang. Appellant said he drove Reveles, Paredez, and Marlene in his Lumina to a Little Caesar's Pizza restaurant and then to Mill Creek Park, where they ate pizza on a bench. Appellant said he and his friends did not throw gang signs, but he saw the football players do so. Appellant and his companions left the park and returned sometime later. Appellant parked his car near the football game. Paredez got out of the car and walked in the direction of the players. Appellant told Hickey that Paredez fired the weapon, which he nicknamed "the strap," at Mill Creek Park on January 16. After the shooting, appellant sat in the driver's seat,

Reveles sat in the front passenger seat, and Paredez sat in the back seat. Appellant told Hickey he drove in an easterly direction on Mill Creek Road, traveled on some back roads, and dropped Reveles and Paredez off at a Houston Street apartment complex. Hickey said he presented a "six-pack" photo lineup to Istevan Gonzalez on February 4, 2010 and Istevan identified Paredez as the shooter.

Marlene Lozoya testified that she, her ex-boyfriend Gilberto Reveles, and two of his friends went to Little Caesar's Pizza at Mary's Vineyard Shopping Center and then Mill Creek Park on January 16, 2010. They traveled in appellant's car, and appellant did the driving. Lozoya said they arrived at the park, went to a bench and ate the pizza, and watched a group of people prepare to play football. After Lozoya and the three men finished the pizza, they began to leave in appellant's car. Lozoya said the football players began to throw gang signs. She later told Detective Hickey, " 'Look, those busters were throwing up 4's.' " Lozoya said "buster" is slang for a member of the Norteno criminal street gang. She said Reveles was a member of the SSK gang, and she assumed appellant and Paredez were also members because they were friends of Reveles.

Lozoya said appellant drove the four of them away from Mill Creek Park. At some point, Paredez expressed irritation and appellant drove back to the park.[3] Lozoya said appellant parked the car on Mill Creek Road adjacent to the park. Paredez got out of the car and then she got out of the car. After Paredez walked "pretty far" into the park, Lozoya heard about five shots and then saw people running. Lozoya said Paredez never displayed a gun in the car.

[3] Detective Hickey subsequently testified that he interviewed Lozoya on the morning of February 5, 2010. Lozoya told Hickey that Paredez said, " 'Let's go back,' " after appellant turned the corner and departed from Mill Creek Park.

Defense Evidence

Appellant did not present documentary or testimonial evidence but chose to rely on the state of the prosecution evidence.

DISCUSSION

I. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY DENYING HIS MOTION FOR MISTRIAL.

Appellant contends the trial court denied his due process right to a fair trial by denying his motion for mistrial after Officer Brumley testified the shooting had been planned or discussed as appellant and the others drove back to Mill Creek Park.

A. Underlying Testimony

The following exchange occurred during direct examination of Officer Brumley during the People's case-in-chief:

> "Q. [By Deputy District Attorney Lianides] So according to Daniel Cardenas, these guys [playing football] were wearing red and they were throwing gang signs.
>
> "A. [By Officer Brumley] Yes. [¶] … [¶]
>
> "Q. And what was the gang significance to you on that?
>
> "A. That it was a disrespect that had to be answered, and they drove around, came up with a plan, and they came back and they executed their mission.
>
> "MR. HAMILTON [defense counsel]: Objection. Move to strike. Can we approach?
>
> "THE COURT: Yeah."

B. Proceedings Outside the Presence of the Jury

Defense counsel advised the court, "[T]he way the question was posed, it allowed this officer to offer some kind of statement of what's going on in the head of my client and what's going on in the heads of the other two clients, which is absolutely beyond what a gang expert's opinions are for. They are not to comment on the subjective intent

of those that are on … trial. That's exactly what he just did with that statement [about the occupants of the vehicle coming up with a plan]." After additional exchanges between court and counsel, the court asked the prosecutor whether any witness was going to testify "[t]hat they came up with a plan, other than your expert." The prosecutor replied, "No."

C. Motion for Mistrial and Ruling

Defense counsel moved for mistrial on the grounds that "it's an expert telling a jury how to do their verdict.… And it is the very heart of this entire trial, is what he just said right there." The court ruled: "I don't think it's risen to the level of a mistrial. I think it can be cured. And it's the Court's suggestion that I read some type of an admonishment … to the jury …." The court went on to explain: "I'm offering to read [the admonition] as a lesser sanction. It's not really a sanction. It's just a cure for what's been said. I don't think it rises to the level of a mistrial. It's not so prejudicial it should be a mistrial." The court further explained: "But I do agree with defense here that that is the ultimate issue in the case for the jury to decide and it's not an appropriate opinion for the expert to make unless there was actually some type of evidence that you can put in the hypothetical where someone says, 'We went and discussed a plan.' He's extrapolating that there was a plan. You don't have any evidence of that other than circumstantial evidence, but that's not appropriate for the expert to opine on."

D. Admonition to the Jury

After proceedings resumed, the court advised the jury: "Ladies and gentlemen, one of the issues in this case is for you to decide whether or not a plan was devised by these individuals to shoot at the victims. That is not an appropriate opinion for the expert in this case, and the last answer will be stricken. That's your decision." The prosecutor suggested: "And the jury should disregard the answer." The court then added: "They should just disregard – well, it will be stricken from the record. They should disregard it."

E. Law Governing Mistrials

"Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) "A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial." (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) We defer to the trial court's factual findings if they are supported by substantial evidence. (*People v. Ayala* (2000) 23 Cal.4th 225, 283, 299; *People v. Batts* (2003) 30 Cal.4th 660, 684-686.) Whether a particular incident is incurable by admonition or instruction is by its nature a speculative matter and is best evaluated by the trial court. (*People v. Collins* (2010) 49 Cal.4th 175, 198.) Ordinarily, a curative instruction to disregard improper testimony is sufficient to protect a defendant from the injury of such testimony and a reviewing court presumes a jury is capable of following such an instruction. (*People v. Allen* (1978) 77 Cal.App.3d 924, 934-935.)

F. Analysis

Appellant contends the case of *People v. Navarrete* (2010) 181 Cal.App.4th 828 (*Navarrete*) compels reversal in the instant case. In *Navarrete,* the defendant appealed from a judgment of conviction for committing a lewd act upon a child. Prior to trial, the defendant successfully moved in pretrial to suppress a statement he made to detectives after his arrest. The prosecution failed to show by a preponderance of the evidence that the detectives had advised defendant of his *Miranda* rights.[4] On the first day of trial testimony, one of the detectives referred to the suppressed statement while he was on the stand under oath. Defendant moved for a mistrial, but the court denied the motion, struck the detective's testimony, and excused him from testifying any further in the case. The

[4] *People v. Miranda* (1966) 384 U.S. 436 (*Miranda*).

court subsequently informed the jury that it had excused the detective and instructed the jury to disregard the testimony. During the lunch break that same day, the prosecutor learned that the detective was upset with the court's suppression order and that his improvident statements under oath were calculated. The prosecutor immediately informed the court and defense counsel, who unsuccessfully renewed his motion for mistrial. At the close of testimony, the court instructed the jurors not to consider stricken testimony and reiterated that its admonition included the detective's testimony.

The Second Appellate District reversed the judgment of conviction. The appellate court noted that "[a] witness's ambiguous and inadvertent reference to a defendant's out-of-court statement previously excluded by the court may not always require the granting of a mistrial." (*Navarrete, supra,* 181 Cal.App.4th at p. 836.) In *Navarrete,* the detective's testimony was neither ambiguous nor inadvertent. The detective's statement "was deliberate, triggered seemingly by his apparent pique at the court's wondering the previous day about the detective's credibility when the court granted appellant's motion to suppress." (*Ibid.*) The appellate court concluded that the detective intended to tell the jury about defendant's statement because he intended to prejudice the jury against defendant. Therefore, the court reversed the judgment and remanded the matter for retrial.

The instant case is factually distinguishable. Officer Brumley, testifying as an expert on criminal street gangs, offered an opinion as to why appellant and the others would depart Mill Creek Park, drive around the area, and then return. In Brumley's opinion, "[I]t was a disrespect that had to be answered, and they drove around, came up with a plan, and they came back and they executed their mission." Nothing in the record suggests that Brumley acted in bad faith or intended to prejudice the jury as did the detective in *Navarrete.* A jury is presumed to have followed an admonition to disregard improper evidence, particularly where there is an absence of bad faith. (*People v. Allen, supra,* 77 Cal.App.3d at p. 934.)

Here, Officer Brumley offered an expert opinion which included brief objectionable references to coming up with a "plan" and executing a "mission." After a lengthy exchange outside the presence of the jury, the court recommenced proceedings and advised the jurors that it was for them to decide whether or not the shooting was planned. The court also advised the jurors that the existence of a plan was "not an appropriate opinion for the expert in this case" and struck Brumley's answer. At the suggestion of the prosecution, the court struck the answer from the record and further instructed the jury to disregard the answer. Moreover, at the conclusion of the evidence, the court instructed the jury: "I ordered testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose."

Given the brevity of Brumley's objectionable statement, the striking of his response, and the court's multiple admonitions to the jury, we conclude the trial court properly exercised its considerable discretion in denying the defense motion for mistrial.

II. THE TRIAL COURT DID NOT ERRONEOUSLY INSTRUCT THE JURY ON THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE.

Appellant contends the trial court denied him a fair trial by instructing the jury on aiding and abetting under the "natural and probable consequences doctrine." He maintains the target offense – assault with a firearm (§ 245, subd. (a)(2)) – is an assaultive crime that merged with the charged crime of attempted murder.

A. Specific Contention

Appellant argues: "In *People v. Chun* (2009) 45 Cal.4th 1172 [(*Chun*)], the California Supreme Court … determined that assaultive crimes cannot be relied on to convict a defendant of second degree murder due to the merger doctrine established in *People v. Ireland* (1969) 70 Cal.2d 522. [¶] … [¶] Assault with a firearm is a general intent crime. Here, the jury was instructed that to convict appellant under the natural and probably consequences doctrine as an aider and abettor to attempted premeditated murder, they only needed to find appellant guilty of assault with a firearm based on an

intent to aid and abet *that* crime so long as a reasonable person would have foreseen attempted premeditated murder could result and that is what Paredez actually intended. Holding appellant criminally liable for attempted premeditated murder when he only contemplated aiding and abetting assault with a firearm is akin to holding him liable for murder under the felony murder doctrine, which is precisely why the reasoning in *Chun* applies here. It obviated the need to prove appellant, as an aider and abettor, shared the same specific intent to kill as the shooter did and it lessened the prosecutor's burden of proof."

B. <u>Challenged Instructions</u>

CALCRIM No. 400 [aiding and abetting: general principles], as read to the jury, stated:

> "A person may be guilty of a crime in two ways. One … he or she may have directly committed the crime. I call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator who directly committed the crime. A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.
>
> "Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."

CALCRIM No. 401 [aiding and abetting: intended crimes], as read to the jury, stated:

> "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:
>
> "One, the perpetrator committed the crime;
>
> "Two, the defendant knew that the perpetrator intended to commit the crime;
>
> "Three, before or during the commission of the crime the defendant intended to aid and abet the perpetrator in committing the crime; and

"Four, the defendant's words or conduct did, in fact, aid or abet the perpetrator's commission of the crime.

"Someone aids or abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

"If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.

"If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not by itself make him or her an aider and abettor."

CALCRIM No. 403 [natural and probable consequences (only non-target offense charged)], as read to the jury, stated:

"To prove that the defendant is guilty of attempted premeditated murder, a violation of Penal Code Section 664/187, the People must prove that:

"One, the defendant is guilty of assault with a firearm in violation of Penal Code Section 245(a)(2);

"Two, during the commission of the assault with a firearm a coparticipant committed the crime of attempted premeditated murder in violation of Penal Code Section 664/187; and

"Three, under all the circumstances a reasonable person in the defendant's position would have known that the commission of attempted premeditated murder in violation of Penal Code Section 664/187 was a natural and probable consequence of the commission of assault with a firearm.

"A coparticipant in a crime is a perpetrator or anyone who aided and abetted a perpetrator. A coparticipant does not include a victim or innocent bystander.

"A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If attempted murder was committed for a reason independent of the common plan to commit assault with a firearm, then the commission of attempted premeditated murder was not a natural and probable consequence of assault with a firearm.

"To decide whether the crime of attempted premeditated murder was committed, please refer to the separate instructions that I will give you on that crime. You must first decide if Kevin Paredez acted with the necessary intent required for attempted premeditated murder. You must then decide if the defendant acted with the necessary intent to aid and abet the originally-intended crime.

"The People are alleging that the defendant originally intended to aid and abet assault with a firearm. [¶] … [¶] If you decide that the defendant aided and abetted this crime and that attempted premeditated murder was a natural and probable consequence of that crime, the defendant is guilty of attempted premeditated murder."

C. <u>Governing Law</u>

"Except for strict liability offenses, every crime has two components: (1) an act or omission, sometimes called the actus reus; and (2) a necessary mental state, sometimes called the mens rea. [Citations.] This principle applies to aiding and abetting liability as well as direct liability. An aider and abettor must do something *and* have a certain mental state." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117, original italics, (*McCoy*).) "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime. [Citation.]" (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164 .)

"The mental state necessary for conviction as an aider and abettor, however, is different from the mental state necessary for conviction as the actual perpetrator. [¶] The actual perpetrator must have whatever mental state is required for each crime charged ….

An aider and abettor, on the other hand, must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] The jury must find 'the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense ….' [Citations.]" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123, original italics.)

An aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted." (*People v. Prettyman* (1996) 14 Cal.4th 248, 260.) "Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault. [Citation.]" (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1117.)

"Under the natural and probable consequences doctrine, an aider and abettor is guilty of not only the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the actual perpetrator. The defendant's knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. [Citation.]" (*People v. Miranda* (2011) 192 Cal.App.4th, 398, 407-408.) The natural and probable consequences doctrine thus allows the jury to convict an aider and abettor of any nontarget crime committed by the actual perpetrator if it was a reasonably foreseeable consequence of the act aided and abetted. (*People v. Favor* (2012) 54 Cal.4th 868, 874.) Whether a charged crime is a natural and probable consequence of a target crime is a question of fact. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) Mere

presence at a crime scene does not suffice to establish aiding and abetting; however, acts tending to demonstrate aiding and abetting include presence at the scene of the crime, companionship, and conduct before and after the crime. (*People v. Miranda*, *supra*, 192 Cal.App.4th at p. 407.)

When the prosecution relies on the natural and probable consequences doctrine to prove a defendant's guilt, the court has a sua sponte duty to identify and describe for the jury any target offense allegedly aided and abetted by the defendant. (*People v. Prettyman*, *supra*, 14 Cal.4th at pp. 268-269.) "In reviewing claims of instructional error, we look to whether the defendant has shown a reasonable likelihood that the jury, considering the instruction complained of in the context of the instructions as a whole and not in isolation, understood that instruction in a manner that violated his constitutional rights. [Citations.] We interpret the instructions so as to support the judgment if they are reasonably susceptible to such interpretation, and we presume jurors can understand and correlate all instructions given. [Citations.]" (*People v. Vang* (2009) 171 Cal.App.4th 1120, 1129.)

D. Analysis

1. Appellant's Specific Contentions

Appellant contends there was no evidence that he knew "Paredez intended to attempt to kill the people in the park, much less that he actually shared such an intent. And this court can only speculate that the jury may have concluded from the evidence that appellant, as an aider and abettor of the shooting, shared an intent to kill. Because the Sixth and Fourteenth Amendments require more, appellant's attempted murder convictions must be reversed."

Appellant's contention is predicated on *People v. Ireland, supra,* 70 Cal.2d 522 (*Ireland*), and *People v. Chun, supra,* 45 Cal.4th 1172. In *Ireland,* the Supreme Court held: "[A] second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence

produced by the prosecution shows to be an offense included *in fact* within the offense charged." (*Ireland, supra,* 70 Cal.2d at p. 539, fn. omitted.) In *Chun, supra,* 45 Cal.4th at page 1200, the Supreme Court concluded: "[A]ll assaultive-type crimes, such as a violation of section 246, merge with the charged homicide and cannot be the basis for a second degree felony-murder instruction." (*Id.* at p. 1178.) The court further explained: "In determining whether a crime merges, the court looks to its elements and not the facts of the case. Accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive." (*Id.,* at p. 1200.)

2. <u>The Factual and Procedural History of *Chun*</u>

In *Chun*, the defendant was one of four persons in a Honda that was stopped at a traffic light. (*Chun, supra*, 45 Cal.4th at p. 1179.) A person or persons in the Honda fired three different guns toward a Mitsubishi that was also stopped at the light. A passenger in the Mitsubishi was killed, and two other persons were wounded. The defendant was charged with "murder, with driveby and gang special circumstances, and with two counts of attempted murder, discharging a firearm from a vehicle, and shooting into an occupied vehicle, all with gang and firearm-use allegations, and with street terrorism." (*Ibid*.)

At trial, the prosecution presented evidence that the defendant had admitted to the police he was involved in the shooting. (*Chun, supra*, 45 Cal.4th at p. 1179.) The defendant told police he had fired a gun, but he also claimed that he had not pointed the gun at anyone, and that he had wanted only to scare the Mitsubishi passengers. The defendant testified and denied any involvement in the shootings. The trial court instructed the jury on first degree murder, and also instructed the jury on two different theories of second degree murder. (*Ibid*.) The trial court specifically instructed the jury on second degree murder based on shooting at an occupied motor vehicle (§ 246), either

directly, or as an aider and abettor, and also instructed the jury on implied malice as a theory of second degree murder. (*Chun, supra*, 45 Cal. 4th at pp. 1202-1203.)

The jury found the defendant guilty of second degree murder and also found that the defendant was an active participant in a criminal street gang. (*Chun, supra*, 45 Cal.4th at pp. 1179-1180.) The jury also found that a principal intentionally used a firearm, and that the shooting was committed for the benefit of a criminal street gang. (*Ibid*.) The jury acquitted the defendant of both counts of attempted murder, shooting from a vehicle, shooting at an occupied motor vehicle, and found the personal use of a firearm allegation not true. (*Id*. at p. 1180.)

On appeal, the California Supreme Court concluded that the trial court had erred in instructing the jury on felony murder as a theory of second degree murder. (*Chun, supra*, 45 Cal.4th at p. 1201.) After reviewing prior case law in this area, the court held, "When the underlying felony is assaultive in nature, such as a violation of section 246 or section 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction." (*Id*. at p. 1200.)

In addressing whether the trial court's instructional error required reversal, the Supreme Court noted that the trial court had adequately instructed the jury on an alternative and legally valid theory of second degree murder, i.e., second degree murder based on conscious-disregard-for-life malice. (*Chun, supra*, 45 Cal.4th at pp. 1202-1203.) The court stated: "In this situation, to find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory …." (*Id*. at p. 1203.) In determining whether the jury had based its verdict on a valid theory, the *Chun* court stated that it would apply the harmless error analysis that Justice Scalia proposed in his concurring opinion in *California v. Roy* (1996) 519 U.S. 2. (*Chun, supra*, 45 Cal.4th at pp. 1204-1205 ["Without holding that [Justice Scalia's approach] is the only way to find error harmless, we think this test works well here, and we will use it"].) The *Chun* court summarized that test as follows: "If other

aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary for conscious-disregard-for-life malice, the erroneous felony-murder instruction was harmless." (*Id*. at p. 1205.)

Applying the foregoing test to the facts in *Chun*, the Supreme Court stated:

> "[A]ny juror who relied on the felony-murder rule necessarily found that defendant willfully shot at an occupied vehicle. The undisputed evidence showed that the vehicle shot at was occupied by not one but three persons. The three were hit by multiple gunshots fired at close range from three different firearms. No juror could have found that defendant participated in this shooting, either as a shooter or as an aider and abettor, without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life – which is a valid theory of malice. In other words, on this evidence, no juror could find felony murder without also finding conscious-disregard-for-life malice. The error in instructing the jury on felony murder was, by itself, harmless beyond a reasonable doubt." (*Chun, supra*, 45 Cal.4th at p. 1205.)

3. Appellant's Application of the Merger Doctrine

Appellant contends the merger doctrine, as enunciated and construed in *Ireland* and *Chun,* should also be applied in this case, where he was convicted on an aider and abettor theory under the natural and probable consequences doctrine, rather than the second degree felony-murder rule. Appellant acknowledges that "courts in the past have found that the merger rule does not apply to indirect aiding and abetting cases where the underlying target offense was assaultive in nature." Nevertheless, appellant contends the reasoning in such cases must be reexamined in light of the Supreme Court's most recent pronouncement in *Chun.*

In *People v. Culuko* (2000) 78 Cal.App.4th 307, 322, the Fourth District noted: "The Supreme Court has repeatedly rejected the contention that an instruction on the natural and probable consequences doctrine is erroneous because it permits an aider and abettor to be found guilty of murder without malice." In *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1190, the Second District rejected a contention similar to that of

appellant, stating in relevant part: "[A]iding and abetting is one means under which derivative liability for the commission of a criminal offense is imposed. It is not a separate criminal offense. [Citation.] As an aider and abettor, it is the intention to further the acts of another which creates criminal liability.… If the principal's criminal act which is charged to the aider and abettor is a reasonably foreseeable consequence to any criminal act of that principal, and is knowingly aided and abetted, then the aider and abettor of such criminal act is derivatively liable for the act charged.… For this reason, the logical and legal impediments to criminal liability as found in *Ireland* are not applicable and do not have persuasive value with respect to limiting an aider and abettor's liability."

"[A] defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator." (*People v. Prettyman, supra,* 14 Cal.4th at p. 261.) Under California law, it is the aider and abettor's "intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which must be found by the jury. [Citation.]" (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.)

Both the perpetrator and the aider and abettor are principals, and all principals are liable for the natural and reasonably foreseeable consequences of their crimes. Whether a shooting is a natural and probable consequence of an assault is a factual issue to be resolved by the jury. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376.) The merger doctrine of *Ireland, supra,* 70 Cal.2d 522 does not apply in this situation and reversal is not required.

III. THE JUDGMENT OF CONVICTION OF ATTEMPTED MURDER WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellant contends the prosecution based his attempted murder charges on a "kill zone" theory and, therefore, there must be an evidentiary correlation between the number of victims Paredez attempted to murder and the number of shots fired. Appellant maintains only equivocal testimony by two of the 10 percipient witnesses suggested that nine shots at most had been fired. He thus concludes that one of his attempted murder convictions must be reversed for lack of substantial evidence.

A. Law of Substantial Evidence

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [].) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [].) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792 [].) ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' " If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances

might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' (*Id*. at pp. 792-793.)" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) A reviewing court neither reweighs evidence nor reevaluates a witness's credibility. (*People v. Booker* (2011) 51 Cal.4th 141, 172.)

B. Law of Attempted Murder

The mental state required for attempted murder differs from the mental state required for murder itself. Murder does not require the intent to kill. Implied malice – a conscious disregard for life – is sufficient. In contrast, attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward the accomplishment of the intended killing. For a defendant to be convicted the attempted murder of each of the individuals in a group into which he fired a single shot, the prosecution must prove the defendant acted with the specific intent to kill each victim. Guilt of attempted murder must be judged separately as to each alleged victim and this is true whether the alleged victim was particularly targeted or randomly chosen. The indiscriminate firing of a single shot at a group of persons, without more, does not amount to an attempted murder of everyone in the group. (*People v. Perez* (2010) 50 Cal.4th 222, 231-232.)

Intent to kill does not transfer to victims who are not killed and "transferred intent" cannot serve as a basis for a finding of attempted murder. With respect to the firing of multiple shots, "a shooter may be convicted of multiple counts of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill" his target victim as well as all others he knew were in the zone of fatal harm. (*People v. Perez, supra*, 50 Cal.4th at p. 232, citing *People v. Smith* (2005) 37 Cal.4th 733, 745-746.)

C. Analysis

Appellant contends the reasoning of *Perez* applies in his case "to the extent that evidence of the number of shots fired must correlate to the number of attempted murder convictions." Appellant maintains each of the shots supports only one conviction for attempted murder. He asserts that Paredez did not use the equivalent of an explosive device or spray the park with automatic weapon fire. He also points out that the testimony about the number of shots fired varied from witness to witness. According to appellant, Ortiz and Banuelos testified to hearing a maximum of eight shots; five other witnesses heard a maximum of nine shots; Omar Gonzalez testified that he heard about 10 shots, and Raul Hernandez testified there were 9 to 10 shots; Juan Vallejo said, "There were quite a bit of shots."

Testimony about the number of fired shots clearly varied from witness to witness. "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. (*People v. Panah* (2005) 35 Cal.4th 395, 488.)

If we accept appellant's premise that "the number of shots fired must correlate to the number of attempted murder convictions," then the testimony of Omar Gonzalez and Raul Hernandez was strongly supportive of that premise. "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." (Evid. Code, § 411.) More specifically, "[t]he uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.) Appellant's citation of conflicting evidence or varied testimony

about the number of gunshots is of no avail. We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. The judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, disapproved on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

The testimony of Omar Gonzalez and Raul Hernandez supported a finding of 10 gunshots and, from that evidence, the jury could reasonably conclude that Paredez acted with the intent to kill any or all of the 10 people playing football in Mill Creek Park on January 16, 2010. The judgments of conviction of attempted murder were supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Wiseman, Acting P.J.

_____
Franson, J.